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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re ANTHONY JACKSON, on Habeas Corpus.	B219805 (Los Angeles County Super. Ct. No. BH005895)

APPEAL from an order of the Superior Court of Los Angeles County. Peter Paul Espinoza, Judge. Affirmed.

UnCommon Law, Keith Wattley and Thomas Master, under appointment by the Court of Appeal, for Petitioner and Respondent.

Edmund G. Brown Jr., Attorney General, Julie L. Garland, Senior Assistant Attorney General, Heather L. Bushman, Supervising Deputy Attorney General, Ryan K. Schneider, Deputy Attorney General, for Appellant.

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INTRODUCTION

After petitioner Anthony Jackson (petitioner) had served almost 20 years of his life sentence for the second degree murder of his wife, the Board of Parole Hearings (Board) found him suitable for parole. Governor Arnold Shwarzenegger (the Governor) reversed the Board's decision, citing the nature of petitioner's crime and the Governor's skepticism that petitioner truly had accepted responsibility for murdering his wife. The trial court granted petitioner's writ of habeas corpus, finding no evidence in the record to support the Governor's determination that petitioner currently presents an unreasonable risk of danger to society.

On appeal, the Attorney General[1] *does not challenge the merits of the trial court's finding*. The Attorney General argues only that, instead of ordering petitioner's release, the trial court should have remanded the matter to the Governor for his reconsideration in light of the California Supreme Court's decisions in *In re Lawrence* (2008) 44 Cal.4th 1181 (*Lawrence*) and *In re Shaputis* (2008) 44 Cal.4th 1241 (*Shaputis*), which were decided after the Governor made his decision reversing the Board.

This same argument recently was considered and rejected by Division Two of this Court in *In re Masoner* (2009) 179 Cal.App.4th 1531 (*Masoner*), and by Division Two of the First Appellate District in *In re Moses* __ Cal.App.4th __ (March 16, 2010, A124814) [2010 Cal.App. LEXIS 341, *68-*72]. (See also *In re Loresch* (March 25, 2010, B220739) __ Cal.App.4th __ [2010 Cal.App. LEXIS 392, *22-*23].) We find these decisions dispositive of this case. We therefore affirm.

BACKGROUND

On January 18, 1986, petitioner killed his wife with a single shot from a rifle, during an argument in which petitioner accused his wife of having an affair. Petitioner's

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[1] The Attorney General represents the nominal appellant, Ben Curry, Warden of the Correctional Training Facility in Soledad, California.

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two small children were in the house at the time. Petitioner called for assistance; his wife was pronounced dead at the scene. Petitioner initially told police that he had come home and found his wife dead on the couch. When the children contradicted petitioner's story, petitioner claimed he shot his wife unintentionally.

Petitioner was convicted by a jury of second degree murder and sentenced to 15 years to life, plus a consecutive two year term for personally using a firearm. He was committed on January 27, 1987 and began serving his life sentence on February 29, 1988. He first became eligible for parole on December 9, 1997.

On February 6, 2008, the Board found petitioner suitable for parole.[2] The Board found that petitioner had no criminal record other than the commitment offense; he had no record of prison discipline; he had an extensive record of participation in counseling and self-help programs, including several anger management programs; he had completed more than 30 educational programs; he had earned vocational certifications in plumbing and appliance repair; and he had earned good reviews for his work as a plumber in the prison. Petitioner had received two positive psychological evaluations. Petitioner had a post-release offer of employment from Sodexho Marriott Services in San Diego, and he had arranged post-release housing with his father and, as a backup, at two halfway houses that help parolees transition from incarceration. The Board noted that petitioner had given "several different versions" of his crime "over the years," but concluded that petitioner showed remorse, understood the nature and magnitude of his offense, and accepted responsibility for his criminal behavior.

The Board computed petitioner's base term of confinement at 216 months (18 years), and petitioner's conduct credit as 80 months (6 years, 8 months). The Board then calculated petitioner's total term of confinement to be 136 months (11 years, four months) and projected release date to be June 29, 1999.

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[2] "For the most part, the Board is made up of persons with law enforcement experience." (*In re Loresch, supra,* __ Cal.App.4th at p. __ [2010 Cal.App. LEXIS at *26.)

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On July 1, 2008, the Governor reversed the Board's decision. The Governor stated that petitioner's crime was "especially atrocious." Although petitioner had no criminal record, the victim's mother had stated at petitioner's sentencing hearing in 1987 that petitioner had a "'violent temper'" and petitioner's daughter had told police that petitioner had threatened his wife with a gun the week before the murder. The Governor also noted that petitioner had, between 1996 and 2004, wavered on whether the shooting was intentional or unintentional, and that the Board had concluded at a hearing in 2005 that petitioner had not yet demonstrated genuine remorse. The Governor concluded, "I find the gravity of the murder committed by [petitioner], along with the evidence that he may not fully accept responsibility for his actions, presently outweigh the positive factors."

Petitioner had another hearing before the Board in February 2009. The Board again found petitioner suitable for parole.[3]

In March 2009, petitioner filed a petition for a writ of habeas corpus. The trial court issued an order to show cause why the petition should not be granted. In the return, the Attorney General argued that the Governor's decision satisfied the "some-evidence" standard set forth in *Lawrence, supra,* 44 Cal.4th 1181, and *Shaputis,* 44 Cal.4th 1241. The Attorney General also offered a two-sentence alternative argument, as follows: "Should a due process violation is [*sic*] found, this Court should not order [petitioner's] immediate release. The proper remedy is for the Court to order the Governor's decision vacated and to remand the matter to the executive to proceed in accordance with due process. [Citation.]"

The trial court granted the petition, concluding that the Governor had failed to "articulate how [his reasons for reversal] show Petitioner is currently an unreasonable

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[3] The Governor reversed the Board's 2009 decision. The Attorney General at oral argument contended that this appeal was therefore moot. We do not agree with the Attorney General. If the mootness doctrine applied and petitioner had yearly hearings with the same results, he might never have a final judicial determination. (See *Masoner, supra,* 179 Cal.App.4th at pp. 1539-1540.)

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risk of danger to society." The trial court ordered the Governor's decision vacated, the Board's decision reinstated, and petitioner released "in accordance with the parole date that the Board calculated." This timely appeal followed.[4]

DISCUSSION

On appeal, the Attorney General does not challenge the trial court's finding that insufficient evidence supported the Governor's determination that petitioner currently poses a danger to public safety. (See *Lawrence*, *supra*, 44 Cal.4th at p. 1191 ["the core statutory determination entrusted to the Board and the Governor is whether the inmate poses a current threat to public safety"].) Instead, the Attorney General argues that the trial court should have remanded the matter to the Governor to permit the Governor "to review and render a decision that could meet the revised some-evidence standard of judicial review set forth in [*Lawrence, supra* 44 Cal.4th 1181, and *Shaputis, supra,* 44 Cal.4th 1241]." We disagree.

The decision of Division Two of this district in *Masoner, supra,* 179 Cal.App.4th 1531, is directly on point. In that case, the petitioner drove a vehicle into a house while driving drunk, killing a four-year-old child and injuring others. He was convicted of second degree murder, vehicular manslaughter while driving under the influence, and driving under the influence. He had one prior conviction for driving under the influence. He was sentenced to 15 years to life with the possibility of parole. (*Id.* at p. 1534.)

Over the next 19 years, the petitioner was a model prisoner. He was not subject to any prison disciplinary action; he completed vocational training and worked at various positions in the prison; and he participated in self-help programs and counseling, including Alcoholics Anonymous. (*Masoner, supra,* 179 Cal.App.4th at p. 1534.) He received positive psychological evaluations; he had a good plan to stay sober after his

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[4] The Attorney General also filed a petition for writ of supersedeas or in the alternative, a stay of the trial court's order. This court stayed the trial court's order until issuance of the remittitur or further order of the court.

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release; and he had accepted responsibility for the death of his victim. The Board found the petitioner suitable for parole. (*Id.* at p. 1535.)

The Governor reversed the Board's decision, citing the nature of the petitioner's crime and his "alleged lack of insight into his crime . . . ." (*Masoner, supra,* 179 Cal.App.4th at p. 1535.) The trial court—presided over by the same trial judge in this case—issued a writ of habeas corpus, finding that the Governor's decision was "not supported by some evidence in the record of the Petitioner's current risk of danger to society . . . ." (*Ibid.*) On appeal, the Attorney General—representing Warden Ben Curry, as in this case (see fn. 1, *ante*)—did "not dispute the superior court's finding that there was no evidence to support the Governor's decision that Masoner was unsuitable for parole. Rather, [the Attorney General] contend[ed] that the remedy ordered by the superior court—reinstatement of the Board's decision releasing Masoner from prison—divest[ed] the Governor of his statutory and constitutional discretion to determine parole suitability, grant[ed] relief beyond the process due, and violate[d] the separation of powers doctrine. Appellant argue[d] that the proper remedy was limited to remanding the matter to the Governor to proceed in accordance with due process." (*Id.* at p. 1536.) Specifically, the Attorney General argued that "the Governor should be permitted to conduct a review in accordance with the standard enunciated in *Lawrence* [*supra,* 44 Cal.4th 1181], which was decided after the Governor's reversal of the Board's . . . parole decision." (*Masoner, supra,* 179 Cal.App.4th at p. 1537.)

The Court of Appeal rejected the Attorney General's arguments. The Governor's ability to review the Board's parole decision was not impacted by the trial court's order as "[t]he Governor . . . [had been] given a full opportunity to exercise his constitutional and statutory right of review." (*Masoner, supra,* 179 Cal.App.4th at p. 1537.) Moreover, the court reasoned, the remedy granted by the Supreme Court in *Lawrence, supra,* 44 Cal.4th at page 1229, was "*not* to remand the case to the Governor for reconsideration, as appellant seeks here; it was to reinstate the Board's decision." (*Masoner, supra,* 179 Cal.App.4th at p. 1537.) When affirming a grant of habeas corpus in other similar cases, the Courts of Appeal had "vacated the Governor's reversal of the Board's decision and

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reinstated the Board's decision without remanding the matter to the Governor." (*Id.* at p. 1538 [citing cases].) Accordingly, the court concluded, "[t]he superior court's disposition here is consistent with these cases and does not divest the Governor of his right to review the Board's parole decisions." (*Ibid.*)

The court in *Masoner, supra,* 179 Cal.App.4th 1531, rejected the Attorney General's reliance on language from *In re Rosenkrantz* (2002) 29 Cal.4th 616 (*Rosenkrantz*), for the proposition that the remedy for a due process violation by the Governor was to remand to provide "the process due by the *Governor*." (*Masoner, supra,* 179 Cal.App.4th at p. 1538.) The court noted that the language from *Rosenkrantz* relied on by the Attorney General concerned judicial review of *Board* decisions, not the *Governor's* decisions. (See *Rosenkrantz, supra,* 29 Cal.4th at p. 658.) The court in *Masoner* explained, "This is a critical difference. 'Although the Board can give the prisoner a new hearing and consider additional evidence, the *Governor's* constitutional authority is limited to a review of the materials provided by the Board.' [Citations.] Remanding the matter to the Governor would be an idle act because the Governor has already reviewed the materials provided by the Board and, according to the superior court's unchallenged order, erroneously concluded that there was some evidence in those materials to support a reversal of the Board's decision. [Citations.]" (*Masoner, supra,* 179 Cal.App.4th at p. 1538.)[5]

The court in *Masoner, supra,* 179 Cal.App.4th 1531, also rejected the Attorney General's argument that "the remedy ordered by the superior court violate[d] the

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[5] In his opening brief in this case, the Attorney General relies not on *Rosenkrantz, supra,* 29 Cal.4th 616, for this proposition, but on language from *In re Criscione* (2009) 173 Cal.App.4th 60, 74-75, 77 (*Criscione*). But *Criscione* also concerned a decision by the *Board* finding an inmate unsuitable for parole, not a decision by the Governor reversing the Board. *Criscione* is thus distinguishable for the reasons stated by the court in *Masoner, supra,* 179 Cal.App.4th at page 1538, with respect to *Rosenkrantz*.

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separation of powers doctrine." (*Id.* at p. 1538.)[6] The Court of Appeal explained, "In *Rosenkrantz*, the Supreme Court held that judicial review of the Governor's parole decisions under the 'some evidence' standard does not violate the separation of powers doctrine. [Citation.] A necessary component of judicial review is the power of the courts to provide the aggrieved party with a meaningful remedy. The remedy provided here does not infringe on the core functions of the Governor or on the Governor's specific authority to review the Board's parole suitability decisions. As stated, the Governor has already reviewed the Board's . . . decision." (*Masoner, supra*, 179 Cal.App.4th at p. 1539.)

Finally, the court in *Masoner, supra,* 179 Cal.App.4th 1531, rejected the Attorney General's position as contrary to due process. The court stated, "'The writ of habeas corpus enjoys an extremely important place in the history of this state and this nation. Often termed the "Great Writ," it "has been justifiably lauded as '"the safe-guard and the palladium of our liberties."'"' [Citation.] The writ is 'a critical check on the Executive, ensuring that it does not detain individuals except in accordance with law.' [Citation.]

"The writ of habeas corpus is the means by which a prisoner seeks to challenge the Governor's reversal of a Board decision granting the prisoner parole. Prisoners possess a liberty interest in the Governor's parole review decisions which is protected by due process of law. [Citation.] A prisoner's due process rights cannot exist in any practical sense unless a prisoner can obtain a writ of habeas corpus protecting such rights. [Citation.]

"In *Rosenkrantz*, the Governor argued that judicial review of a parole review decision should be limited to determine whether the decision, on its face, complies with due process without determining whether there was any evidence to support the decision.

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[6] The court in *Masoner, supra,* 179 Cal.App.4th at page 1539, concluded that the separation-of-powers argument was forfeited because the Attorney General failed to provide legal analysis and to cite authority. The court nevertheless held in the alternative that the argument lacked merit. (*Id.* at pp. 1539-1540.)

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The Supreme Court, however, rejected that argument. It held: 'If we were to adopt the Governor's position, a parole review decision with no basis in fact and not supported by *any* evidence in the record would be upheld as long as the decision, on its face, recited supposed facts corresponding to the specified factors and appeared reasonable. Such a decision, however, would be arbitrary and capricious and, because it affected a protected liberty interest, would violate established principles of due process of law.' [Citation.]

"In the present case, appellant contends that the matter must be remanded to the Governor even though the superior court found that there was no evidence to support the Governor's reversal of the Board's parole decision, a finding the Governor does not challenge. If we were to adopt appellant's position, however, a prisoner's due process rights and the writ of habeas corpus would be meaningless under the circumstances of this case because the Governor could arbitrarily detain a prisoner indefinitely, without evidence of the prisoner's current dangerousness and in violation of California law, and the courts would have no practical power to grant the prisoner relief. The rule proposed by appellant would entitle the Governor to repeatedly 'reconsider' the release of the prisoner no matter how many times the courts found that there was no evidence that the prisoner was currently dangerous. Such a rule would violate principles of due process and eviscerate judicial scrutiny of the Governor's parole review decisions. We thus reject appellant's arguments and hold that the superior court acted well within its authority in declining to remand the matter to the Governor." (*Id.* at pp. 1539-1540.)

We follow the authority of *Masoner, supra,* 179 Cal.App.4th 1531. The Attorney General makes no attempt to distinguish that decision from this case, and we find it to be dispositive. As in *Masoner,* in this case the Governor had a full opportunity to review the record provided by the Board and to state his reasons for reversing the Board's decision. The trial court found those reasons to be unsupported by the evidence, and the Governor has not challenged that finding. The Attorney General has not articulated any new or different reasons for reversing the Board's decision, nor has he cited the record to support any such new or different reasons. Remand to the Governor would be an idle act. Accordingly, as the court in *Masoner,* we "reject appellant's arguments and hold that the

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[trial] court acted well within its authority in declining to remand the matter to the Governor." (*Id.* at pp. 1539-1540; see also *In re Loresch, supra,* __ Cal.App.4th at p. __ [2010 Cal.App. LEXIS 392, *22-*23]; *In re Moses* __ Cal.App.4th at p. __ [2010 Cal.App. LEXIS 341, *68-*72].)

Although not cited in his briefs, the Attorney General relied at oral argument on *In re Ross* (2009) 170 Cal.App.4th 1490 (*Ross*). That case is inapposite. In that case, the trial court *denied* a prisoner's petition for a writ of habeas corpus, finding some evidence in the record to support the Governor's decision to reverse the Board's grant of parole. (*Id.* at p. 1496.) The prisoner filed a petition for a writ of habeas corpus in the Court of Appeal. (*Id.* at pp. 1496-1497.) While the petition was pending in the appellate court, the Supreme Court issued its decision in *Lawrence, supra*, 44 Cal.4th 1181. Applying the standard of review articulated in *Lawrence,* the Court of Appeal in *Ross* agreed with the trial court that the Governor's decision was supported by some evidence. (*Ross, supra,* 170 Cal.App.4th at pp. 1497, 1504-1505, 1510-1512.) The appellate court concluded, however, that the Governor's "written decision [was] flawed" because it did not contain "a more explicit 'articulation of a rational nexus between th[e] facts and current dangerousness,'" as required by *Lawrence.* (*Id.* at p. 1497.) Accordingly, the appellate court remanded to the Governor to permit him to articulate that "nexus" and to clarify whether he had relied on troubling evidence regarding the prisoner's mental state. (*Id.* at pp. 1498, 1513-1515.) Unlike *Ross,* in this case the trial court found *no* evidence in the record to support the Governor's decision. The Attorney General has not challenged that finding and has not identified any such evidence in his presentation on appeal. We note that the court in *In re Moses, supra,* __ Cal.App.4th at p. __ [2010 Cal.App. LEXIS 341, *72], distinguished *Ross* on these same grounds.

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DISPOSITION

The order of the trial court dated September 11, 2009—which granted petitioner's petition for a writ of habeas corpus; reinstated the Board's February 6, 2008 decision; vacated the Governor's July 1, 2008 reversal of that decision; and ordered petitioner released from prison in accordance with the parole date calculated by the Board—is affirmed. The stay of the trial court's order is lifted. In the interests of justice, this opinion is made final as to this court immediately upon its filing. (*In re Dannenberg* (2009) 173 Cal.App.4th 237, 257.)

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MOSK, J.

We concur:

ARMSTRONG, Acting P. J.

KRIEGLER, J.